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No. 85-588

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1985

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THE UNIVERSITY OF TENNESSEE, et al.  
Petitioners

v.

ROBERT B. ELLIOTT  
Respondent

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**AMICUS CURIAE BRIEF FOR THE STATE OF**  
**KANSAS AND OTHER JOINING STATES**

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## QUESTION PRESENTED

Whether traditional principles of preclusion apply in an action under section 1983, Title VII, and other civil rights statutes, to preclude issues fully and fairly litigated before a state administrative agency acting in a judicial capacity to protect Fourteenth Amendment liberty and property interests of state employees.

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INTEREST OF AMICUS CURIAE STATES

This case focuses on the preclusive effect, in a subsequent section 1983 or Title VII civil rights action, of a prior state administrative adjudication conducted to protect Fourteenth Amendment liberty and property interests of aggrieved state employees whose interests

are threatened by state agency action. The State of Kansas and the other states, joining as amici curiae, maintain administrative forums which, acting in a judicial capacity, provide a full and fair trial-type hearing in which to contest disciplinary action proposed or taken against state employees. Pursuant to state law, these administrative judgments are entitled to preclusive effect in the courts of the amici curiae states and should be entitled to full faith and credit in federal courts pursuant to the requirements of Art. IV § 1 of the Constitution and 28 U.S.C. § 1738.

On behalf of the various state agencies, whose defense in these administrative decisions must be borne by the Attorneys General of the amici curiae states, the State of Kansas and the joining states assert their vitally important interests as amici curiae in the question presented in this case that full faith and credit be applied to the trial-type administrative tribunals of these states established to conduct their required duty under the Fourteenth Amendment to

resolve disputes between state agencies and their employees involving constitutionally protected interests.

ARGUMENT

FULL FAITH AND CREDIT APPLIES WITHOUT EXCEPTION IN SECTION 1983 AND TITLE VII CASES TO THE ISSUES FULLY AND FAIRLY LITIGATED BY STATE AGENCY ADJUDICATIONS ESTABLISHED UNDER THE 14th AMENDMENT.

- A. Denial of Full Faith and Credit Will Seriously Threaten State Administrative Functions.

In Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972), this Court mandated that "[w]hen protected [Fourteenth Amendment] ... interests are implicated," by state agency action, "the right to some kind of prior hearing is paramount." This mandate was extended in Loudermill v. Cleveland Bd. of Educ., \_\_\_ U.S. \_\_\_, 105 S.Ct. 1487 (1985) to require a hearing prior to state agency action which threatens constitutionally protected rights.

The legislatures of the amici curiae states have established various statutory

administrative forums in which the state employee, or state prisoner, is entitled to a full formal, trial-like, evidentiary due process hearing. These administrative trials established for purposes of protecting Fourteenth Amendment interests--and not as Title VII, section 706(c) deferral agencies under the EEOC/ deferral agency investigatory scheme-- should be entitled to preclusive effect in subsequent section 1983 and Title VII federal civil rights actions to the same extent as they are entitled to preclusion in the courts of the amici curiae states. Denial of full faith and credit not only will undermine the repose and finality of these administrative judgments but will also erode the ability of states to administer themselves with confidence. Such a denial will also call into serious question the efficacy and viability of modern state administrative agencies to implement legislative and executive duties and goals delegated to these agencies, absent which state governments, in this complex technological information era of conflicting and

interconnected interests, cannot adequately function. The ability to relitigate the same issues de novo in federal court effuses the initial administrative adjudicatory process with futility. Virtually all such administrative judgments are potentially reviewable either under section 1983 or Title VII; therefore, a denial of preclusion to issues tried by state agencies poses a serious threat to the administrative functions of state government.

- B. This Court Has Recognized No Exception In Subsequent Section 1983 Or Title VII Actions For Applying 28 U.S.C. § 1738 To Issues Decided In These Agency Decisions.

The Full Faith and Credit Clause of Art. IV, § 1 of the Constitution is applicable to the federal courts by 28 U.S.C. § 1738 which requires that "[t]he ... judicial proceedings of any such State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of any such State ... from which they are taken." This

Court has ruled previously that section 1983 and Title VII federal civil rights actions are not categorically exempt from application of section 1738. See Allen v. McCurry, 449 U.S. 90 (1980); Migra v. Warren City School District, 465 U.S. 75 (1984); Kremer v. Chemical Construction Co., 456 U.S. 461 (1982). This Court has also ruled that there is no express repeal of section 1738's application in either section 1983 or Title VII; nor has this court found any implied repeal or exception to section 1738 unless footnote 7 of Kremer can possibly be read to be an exception as to section 706 deferral agencies under the Title VII administrative investigation and enforcement scheme. See 456 U.S. at 470 n.7.

But the state agencies whose adjudications are in question here are not the section 706 deferral agencies of these amici curiae states but rather those agencies outside the Title VII enforcement scheme, and established instead to protect Fourteenth Amendment interests, before which state employees may raise discrimination issues, not discrimination

claims, as a defense to the disciplinary charges against the employee. When a state employee chooses to invoke the trial-like agency adjudications, which the state is burdened with providing, then the issues decided by the state agency should be entitled to issue preclusion under Art. IV § 1 and 28 U.S.C. § 1738 even though the agency is not established to try and resolve section 1983 and Title VII claims.

The Sixth Circuit's refusal to grant issue preclusion is not only inconsistent with that Circuit's prior decision in Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 559 n. 12, (6th Cir. 1983), aff'd, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 1487 (1985) but also inconsistent with this Court's recent interpretation of Kremer in Marrese v. American Academy of Orthopaedic Surgeons, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S. Ct. 1327, 1332 (1985) that "absent an exception to § 1738, state law determines at least the issue preclusion effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts."

Moreover, the Sixth Circuit's conclusion "that state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to federal court" is inconsistent with this Court's decisions which require that state agencies give due process hearings in the first place in order to protect Fourteenth Amendment interests. Elliott v. University of Tennessee, 766 F.2d 982, 992 (6th Cir. 1985). This lack of trust also conflicts with Allen and Migra in which this Court clearly indicated its confidence in the ability of state judicial proceedings to protect constitutional rights.

The Sixth Circuit's decision indicates a basic distrust of the state administrative adjudicatory process. However, no longer is it questioned that "when an agency conducts a trial type hearing, makes findings, and applies the law, the reasons for treating its decision as res judicata are the same as the reasons for applying res judicata to a decision of a court that used the same procedure." K. Davis, Administrative Law

Treatise, § 21:2 (1983); see generally Restatement of Judgments (Second) § 83 (1982). Indeed, this Court's decision in United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), that trial-like agency adjudication is entitled to preclusive effect, has been applied in hundreds of state court decisions and in all of the courts of appeal.

Moreover, this Court has never had any trouble in applying full faith and credit to state administrative adjudications. See Thomas v. Washington Gas Light Co., 448 U.S. 201 (1980); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943); Chicago R.I. & P.Ry. v. Schendel, 270 U.S. 611 (1926). Clearly, what comprises a state "judicial proceeding" within the meaning of Art. IV, § 1 and 28 U.S.C. § 1738 is not self-defining but is dependent upon state law. In Riley v. New York Transit Co., 315 U.S. 343, 349 (1942), this Court noted that Art. IV, § 1 makes each state's preclusion rules "a part of national jurisprudence," requiring courts to look to the law of the originating state to determine if the

decision under review is entitled to preclusion.

The legislatures of each state have power to provide when their administrative agencies will act in a judicial capacity. This point is well illustrated in Buckhalter v. Pepsi-Cola General Bottlers, Inc., 768 F.2d 842 (7th Cir. 1985) in which the Seventh Circuit distinguished the full trial-like hearing provided by the State of Illinois with the much less formal agency hearing in Kremer. The thrust of Buckhalter is that the judicial capacity of the state agency under the Illinois statute, unlike the Kremer hearing, was so formal and trial-like that common law preclusion was applicable, under the administrative res judicata doctrine of Utah Construction. When Buckhalter's common law preclusion analysis is applied to agencies outside of Title VII, i.e., non-deferral agencies, it becomes readily apparent there is no reason to apply only common law preclusion but that 28 U.S.C. § 1738 statutory full faith and credit preclusion also applies. After all, since the

underlying purpose of the Full Faith and Credit Clause was to constitutionalize as national policy the applicability of a state's traditional common law preclusion principles of res judicata and collateral estoppel, then it is clear that the common law preclusion rules applied by Buckhalter are the same rules to be applied under section 1738 in order to determine the preclusive effect of a prior state decision.

The reasons that this Court cited in Allen v. McCurry for applying section 1738--promoting the comity between state and federal courts, avoiding the cost and vexation of multiple lawsuits, conservation of judicial resources, prevention of inconsistent decisions, and the repose achieved from reliance on adjudication--are fully applicable to trial type state agency adjudications and should be applied to prevent litigation of issues already decided between the parties.

C. Issue Preclusion In This Case Will Resolve A Dilemma Faced By The States.

The amici curiae states face the dilemma of wasting the time, effort, and

resources in providing trial-like agency due process hearings to protect Fourteenth Amendment interests and then have federal district courts wipe out the previous hearing by de novo review on the same issues in subsequent section 1983 and Title VII actions. Many states provide full trial-like hearings under the state administrative procedure act, modeled after the Uniform Law Commissioners' Model Administrative Procedures Act. Other states like Kansas have a civil service statute which includes due process hearing provisions.

Under the Kansas Civil Service Act, state employees are provided with the full range of due process protections: notice, right to be heard, to be represented by counsel, to present evidence, to compel attendance of witnesses, and to cross-examine opposing witnesses K.S.A. 75-2929(d). The employee may defend against the disciplinary action on the issue that the reasons are "political, religious, racial," K.S.A. 75-2949(a), "national origin, ancestry ... age, sex or physical disability." K.A.R. 1-19-

18(c), (d). The employee has the right to apply for an administrative rehearing K.S.A. 75-2929e(c), and the right to appeal an adverse decision to Kansas district courts K.S.A. 60-2101(d); Thompson v. Amis, 208 Kan. 658, 493 P.2d 1259 (1972), the Kansas Court of Appeals, and the Kansas Supreme Court.

Kansas law says the Kansas Civil Service Board acts in a judicial capacity in its decisions. Gawith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169, 476 P.2d 966 (1970). A decision by the Commission becomes a final judgment upon the running of the appeal period. State ex rel. Sanborn v. Unified School District, 218 Kan. 47, 542 P.2d 664 (1975). The relief ordered by such final order would be enforceable in Kansas courts, the issues decided could not be collaterally attacked, and Kansas courts would embrace the final administrative decision, after time for appeal expires, as a full-fledged court judgment. The Tenth Circuit, applying Kansas law, recognizes this. Rawlings v. United States, 686 F.2d 903 (10th Cir. 1982);

Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir. 1972), cert. denied, 375 U.S. 942 (1963).

However, in two unreported decisions, one by each of the federal district judges in the District of Kansas, different results have occurred in subsequent civil rights actions. In one, the court granted preclusive effect to the Kansas Civil Service Commission decision. In the second case, the Court granted no full faith and credit to the commission's decision.

Collateral attack of these issues is not allowed in Kansas court. Hutchinson National Bank & Trust Co. v. English, 209 Kan. 127, 130 (1972). The collateral attack invited in federal district court under section 1983 and Title VII is inconsistent with this Court's caution in Marrese that district courts may not, consistent with section 1738, elect to grant either more or less preclusive effect than would the state courts. 105 S. Ct. at 1332-1335. The district court's role, absent an exception to 1738, is to determine what the state

court's would do when confronted with an identical situation, then do that. See Carpenter v. Reed, ex rel. Dept. of Public Safety, 757 F.2d 218, 219 (10th Cir. 1985).

The dilemma faced by the State of Kansas as to the final effect of adjudications by its Civil Service Commission is being faced, in differing scenarios but the same plot, by the other amici curiae states. The granting of issue preclusion to such agency decisions will resolve the dilemma and continue to leave the federal district courts as final enforcers of civil rights claims. Collateral estoppel precludes the relitigating of issues properly before and actually tried by the agency. Therefore, applying issue preclusion has the following positive results: If the employee raises the issue of discrimination as a defense and prevails before the agency, the state is bound by those issues decided, and the employee can proceed to federal court to obtain supplemental relief under section 1983 or Title VII. If the employee raises the issue of discrimination as a

defense but fails, he is precluded from relitigating that issue.

Application of issue preclusion in these instances will provide repose to final state administrative adjudications and will restore confidence to state agencies that issues already decided by their adjudications will not be overturned in the future by an inconsistent federal court factfinding on the identical issues. The civil rights litigant will still have access to the federal courts on his section 1983 or Title VII claims. The federal district courts, however, will be relieved of the burden of retrying issues already fully litigated. Conservation of judicial resource will result as well as fulfillment of the national policies of comity and federalism which are the foundation of full faith and credit.

#### Conclusion

For the reasons stated, this Court should reverse the Court of Appeal's

decision and should apply full faith and credit to the issues fully and fairly litigated in the agency decision in this case.

Respectfully submitted,

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